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No. 89-1646

In The
Supreme Court of the United States
October Term, 1989

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

MARCUS S. SMITH, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS MARCUS, HILDEGARD AND DOMINIQUE SMITH IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Employees Liability Reform and Tort Compensation Act supercedes the Gonzalez Act and deprives the Smiths of the cause of action against a military physician (expressly recognized in subsection (f) of the Gonzalez Act) for medical negligence committed within the scope of his military medical duties overseas.

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BRIEF OF RESPONDENTS MARCUS, HILDEGARD AND DOMINIQUE SMITH IN OPPOSITION

Respondents Marcus, Hildegard and Dominique Smith respectfully ask that the Petition for a Writ of Certiorari sought by the United States to review the judgment of the United States Court of Appeals for the Ninth Circuit entered September 26, 1989 be denied.

SUMMARY OF THE ARGUMENT

The Petition for a Writ of Certiorari is based upon a fundamental misstatement of the holding of the United

States Court of Appeals for the Ninth Circuit in *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989).

Contrary to the United States' assertion, the court of appeals did not hold that the Federal Employees Liability Reform and Tort Compensation Act ("the FELRTCA") is inapplicable "whenever an exception to the Federal Tort Claims Act would preclude an award of damages against the United States". Petition at 8.

To the contrary, the court of appeals held (1) that as a military physician Dr. Marshall is susceptible to suit for medical negligence committed within the scope of his military medical duties overseas as provided in the Gonzalez Act, 10 U.S.C. §1089(f); (2) that Dr. Marshall enjoys immunity from personal liability (*i.e.* indemnification by the United States) for any judgment rendered against him in that action as provided in the Gonzalez Act; and (3) that the FELRTCA does not deprive the Smiths of the cause of action against Dr. Marshall provided in the Gonzalez Act.

The holding in *Smith* is consistent with the language, purpose and legislative history of the Gonzalez Act, a federal statute which specifically addresses the immunity *vel non* of military physicians for claims based on medical negligence committed within the scope of their military medical duties overseas.

The holding in *Smith* is also consistent with the FELRTCA, which was enacted to protect federal employees from a perceived erosion in *common law* tort immunity

and was not intended to affect the immunity of federal employees already protected by the Gonzalez Act and other federal immunity statutes.

Consistent with this purpose, the FELRTCA and its legislative history provide no evidence that Congress intended to supercede or impliedly repeal the Gonzalez Act. To the contrary, the FELRTCA expressly states that the exclusive remedy provision (on which the United States relies for the proposition that Dr. Marshall is absolutely immune from suit) "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of a statute of the United States under which such action against the individual is otherwise authorized." *See* 28 U.S.C. §2679(b)(2).

As such, established principles of statutory construction support the court of appeals' holding that the FELRTCA does not supercede the Gonzalez Act, that Dr. Marshall is susceptible to suit under the Gonzalez Act and is entitled to immunity from personal liability for any judgment entered against him in the Smiths' action.

There is no controversy among the courts of appeals concerning the proper resolution of the issue in *Smith*. To the contrary, in the only other discovered case addressing whether the FELRTCA supercedes a pre-existing federal immunity statute, the United States Court of Appeals for the Eleventh Circuit also held that a military physician-defendant was specifically protected by the Gonzalez Act and was therefore not among those federal employees

affected by the FELRTCA. *See Newman v. Soballe*, 871 F.2d 969 (11th Cir. 1989).

If the United States were to prevail on the position advanced in the Petition, the parents of a severely injured tort victim, now seven years old and without cognitive life, will never recover damages that would at least address the enormous cost of caring for their brain-devastated child, and a military physician will avoid a judgment for which the United States would ultimately have indemnified him.

The court of appeals in *Smith* properly held that the FELRTCA does not support this result and that the Gonzalez Act expressly precludes it.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE UNITED STATES MISSTATES THE HOLDING OF THE COURT OF APPEALS IN *SMITH v. MARSHALL*

The United States' assertion that the Supreme Court of the United States should grant *certiorari* to review the decision of the United States Court of Appeals for the Ninth Circuit in *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), is based on a fundamental misstatement of the holding in that case.

Contrary to the United States' assertion, the court of appeals in *Smith v. Marshall* did not hold that the FELRTCA is inapplicable "and thus exposes federal employees to suit in their individual capacity – whenever an exception to the Federal Tort Claims Act would preclude an award of damages against the United States." Petition

at 8. On the contrary, the court of appeals was not called upon to decide an issue of such breadth. Instead, the court of appeals properly delineated the only issues before it as follows: 1) whether an American military physician working in a foreign country is immune from a malpractice suit under the Gonzalez Act, 10 U.S.C. § 1089 (1976)[1] and 2) whether an American military physician working in a foreign country is immune from suit under the recently-enacted Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. § 2679 (Supp.1989)) *See Smith v. Marshall*, 885 F.2d at 651, App. at 1-2a.[2]

Resolving the first of these issues, the court of appeals properly held that the Gonzalez Act expressly governs the immunity *vel non* of military physicians who commit acts of negligence within the scope of their military medical duties, that subsection (f) of the Gonzalez

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[1] The Gonzalez Act, 10 U.S.C. § 1089, also known as the Medical Malpractice Immunity Act, is part of Chapter 55 of the United States Code, entitled "[m]edical and dental care". The purpose of Chapter 55 "is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents." *See* 10 U.S.C. § 1071.

[2] Citations to "App." are to the Appendix to the Petition.

Act plainly permits suit against individual military physicians for medical negligence committed overseas,[3] that subsection (f) of the Gonzalez Act accords such physicians immunity from personal liability through indemnification for any judgment rendered against them, and that the Gonzalez Act therefore "does not give Dr. Marshall [absolute] immunity from the Smiths' suit."[4] *See Smith v. Marshall*, 885 F.2d at 653, App. at 6a.

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[3] 10 U.S.C. § 1089(f) provides:

> The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

[4] The court of appeals properly noted that this conclusion is consistent with the position of the majority of courts which have interpreted the Gonzalez Act and with the legislative history, which demonstrates that Congress did not intend to leave victims of medical negligence committed by American military physicians in foreign countries without a judicial remedy. *Smith v. Marshall*, 885 F.2d at 653, App. at 6a.

After the filing of briefs on Dr. Marshall's susceptibility to suit under the Gonzalez Act, the United States withdrew its Gonzalez Act argument entirely,[5] thereby conceding that Dr. Marshall is susceptible to suit under the Gonzalez Act for medical negligence committed by him overseas and must be indemnified for a judgment subsequently rendered against him. In its place, the United States asserted that the FELRTCA, which was enacted during the pendency of the appeal, provided an "independent source" of immunity for Dr. Marshall which superceded [and therefore impliedly repealed] the Gonzalez Act. *Id.* at 654. The United States relied solely upon this interpretation of the FELRTCA to support its contention that Dr. Marshall was entitled to absolute immunity. *See Smith v. Marshall*, 885 F.2d at 651, App. at 3a.

Rejecting this contention, the court of appeals concluded that the FELRTCA "did not take away the Smiths' [Gonzalez Act] cause of action against Dr. Marshall," that the FELRTCA is therefore inapplicable to this case, and that "we join the Eleventh Circuit in holding that [the] FELRTCA does not bar medical malpractice claims brought against military personnel serving abroad." *Id.* at 656, App. at 12-13a.

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[5] The United States did so based on the Eleventh Circuit's decision in *Newman v. Soballe*, 871 F.2d 969 (11th Cir. 1989), which was decided after oral argument in *Smith*. *See Smith v. Marshall*, 885 F.2d at 651, App. at 3a.

Thus, *Smith v. Marshall* does not hold that the FELRTCA is inapplicable whenever an exception to the Federal Tort Claims Act would preclude an award of damages against the United States,[6] only that the FELRTCA does not bar medical malpractice claims cognizable under the Gonzalez Act for the medical negligence of military personnel serving abroad. *Id.*

Significantly, the United States has not asked this Court to review those aspects of the *Smith* decision which concern Dr. Marshall's susceptibility to suit and entitlement to indemnification under the Gonzalez Act. Instead, the United States asks this Court to review the court of appeals' holding that the FELRTCA does not supercede the Smiths' Gonzalez Act remedy against Dr. Marshall.

II. THE COURT OF APPEALS IN *SMITH v. MARSHALL* PROPERLY HELD THAT THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT DOES NOT SUPERCEDE OR IMPLIEDLY REPEAL THE GONZALEZ ACT

Underlying each of the positions advanced by the United States is the erroneous assertion that FELRTCA

[6] For this proposition, the United States apparently relies on a portion of the *Smith* opinion, not part of the holding, in which the court of appeals reasoned that the Gonzalez Act expressly provides for a remedy against an individual military physician for medical negligence committed within the scope of his military medical duties in a foreign country and consequently that a subsequently-enacted statute which, like the FELRTCA, simply fails to address a remedy for the same wrong was insufficient to "take away" the Smiths' Gonzalez Act remedy.

impliedly repealed the Gonzalez Act. As set forth below, established principles of statutory construction preclude such a finding and further establish that *Smith v. Marshall* was properly decided.

It is an established rule of statutory construction that implied repeals are not favored and that if effect can reasonably be given to consecutive statutes, the presumption is that the earlier statute is intended to remain in force.[7] *United States v. Vuitch*, 402 U.S. 62 (1971); *Chew Heong v. United States*, 112 U.S. at 536.

Established principles of statutory construction also dictate that a statute dealing with a narrow, precise and specific subject is not submerged by a later-enacted statute covering a more generalized spectrum and that absent a clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of

[7] To find an implied repeal,

> [t]here must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy . . . It must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be.

Chew Heong v. United States, 112 U.S. 536 (1884), *quoting Wood v. United States*, 41 U.S. (16 Pet.) 342 (1842) and *State of South Carolina v. Stoll*, 84 U.S. (17 Wall.) 425 (1873).

the priority of enactment.[8] *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). "The issue breaks down to whether a clear intention otherwise" can be discovered, whether, in short, it can be fairly concluded that the [later statute] operated as a *pro tanto* repeal of [the earlier one]." *Bradley v. Kissinger*, 418 F. Supp. 64 (D.D.C. 1976). Such an intention on the part of the legislature to repeal must be clear and manifest. *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). It is not enough to show that the two statutes produce differing results when applied to the same facts for that no more than states the problem; rather, when two statutes are capable of co-existence, it is the duty of the courts to regard each as effective. *Morton v. Mancari*, 417 U.S. at 551.

As between the FELRTCA and the Gonzalez Act, only the Gonzalez Act addresses the narrow issue as to the form of immunity applicable to a military physician with respect to claims arising out of medical negligence committed within the scope of his military medical duties

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[8] In *Morton v. Mancari*, this Court articulated:

> The reason and philosophy of the rule is that when the mind of a legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter one such a construction, in order that its words shall have any meaning at all.

417 U.S. at 551.

in a foreign country.[9] As such, unless the FELRTCA expressly repeals the Gonzalez Act, there is no foundation for a finding that the FELRTCA applies to this case.

Far from expressly repealing the Gonzalez Act, the FELRTCA expressly contemplates that other federal statutes may authorize actions against individual federal employees and expressly provides that the FELRTCA shall not be construed in derogation of such statutes. *See* 28 U.S.C. § 2679(b)(2). Thus, Section 5 of the FELRTCA states that the exclusive remedy provision on which the United States relies "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States . . . or for a violation of a statute of the United States under which such action against an individual is otherwise authorized."[10] *See* 28 U.S.C. § 2679(b)(2), App. at 22a.

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[9] As set forth in the legislative history of the Gonzalez Act, Congress expressly recognized that the Federal Tort Claims Act does not apply to actions arising overseas and designed subsection (f) indemnification to immunize a military physician from personal liability for all claims arising in foreign countries. *See* S. Rep. No. 94-1264, 1976 U.S. Code Cong. and Admin. News 4443, 4451.

[10] While the United States questions, without the benefit of authority, whether a Gonzalez Act suit against a military physician is properly characterized as a "violation" of the Gonzalez Act within the meaning of Section 5, no discovered cases have held otherwise.

In addition, at least one court has held that the FELRTCA does not immunize an individual federal employee from suit under 42 U.S.C. § 1985, a federal statute which provides a

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Thus, Congress has nowhere demonstrated an intention to repeal the Gonzalez Act or the host of other pre-FELRTCA immunity statutes tailored to the concerns of specific branches or functions of government. *See e.g.* 22 U.S.C. § 2702 (1980) (immunity statute covering State Department employees); 38 U.S.C § 4116 (1965) (immunity statute covering Veterans Administration employees); 42 U.S.C. § 2458a (1976) (immunity statute covering NASA employees); 42 U.S.C. § 233 (1970) (immunity statute covering Public Health Service employees); 10 U.S.C. § 1054 (1986) (immunity statute covering Department of Defense employees).

That Congress did *not* intend the 1988 enactment of the FELRTCA to impliedly repeal pre-existing immunity statutes is further demonstrated by its 1988 amendment of the Veterans Administration Medical Malpractice Immunity Act, 38 U.S.C. § 4116[11] to state that "the exception [to the United States' liability under the Federal Tort

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remedy for specified conduct (conspiracy to interfere with civil rights) which cannot accurately be described as a "violation" of 42 U.S.C. § 1985. *Washington v. U.S. Postal Service*, 1990 W.L. 36239 (N.D.Ill. 1990). Another court has held that the FELRTCA does not immunize federal employees from suits which "arise under" the United States Constitution or federal statutes. *See Saratoga Sav. and Loan Ass'n v. Federal Home Loan Bank of San Francisco*, 724 F. Supp. 683 (N.D. Cal. 1989).

[11] Significantly, the Gonzalez Act was patterned after and is substantially similar to 38 U.S.C. § 4116, a statute which Congress enacted in 1965 to immunize Veterans Administration employees from personal liability for malpractice

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Claims Act, 28 U.S.C. § 1346(b)] provided in section 2680(h) of title 28 [retaining the United States' sovereign immunity for assault and battery] shall not apply" to claims arising under that Act. This amendment demonstrates Congress' understanding that specific federal immunity statutes would remain effective notwithstanding the FELRTCA. The 1988 amendment of the Veterans Administration Medical Malpractice Immunity Act to provide a remedy for assault and battery,[12] a cause of action likely to arise out of a physician's failure to provide a patient with informed consent, also evidences Congress' intent to tailor immunity statutes to the particular functions of specific federal employees and to compensate victims of their negligence.

Because the FELRTCA and its legislative history do not support a finding that the FELRTCA impliedly repeals or otherwise supercedes the Gonzalez Act, the court of appeals properly reconciled the statutes by holding, in conformity with the only other court of appeals to have addressed this issue, that as a military physician Dr. Marshall is specifically protected by the Gonzalez Act

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judgments and to compensate malpractice victims. *See* 38 U.S.C. § 4116. In addition to having identical purposes, each act contains an almost identical opening subsection in which the Federal Tort Claims Act is made the "exclusive remedy" for specific torts. *See* 10 U.S.C. § 1089(a) and 38 U.S.C. § 4116(a). Each act also contains a subsection which, in almost identical terms, permits suit against an individual physician for medical negligence arising in a foreign country and provides that the physician shall be indemnified for any judgment rendered against him in that action. *See* 10 U.S.C. § 1089(f) and 38 U.S.C. § 4116(e).

[12] The Gonzalez Act so provides at 10 U.S.C. § 1089(e).

and is not among those federal employees affected by the FELRTCA. *See Newman v. Soballe*, 871 F.2d at 969, 971 (11th Cir. 1989), and Section V, *infra*.

III. THE HOLDING OF THE COURT OF APPEALS IN *SMITH v. MARSHALL* IS CONSISTENT WITH THE PURPOSE AND LEGISLATIVE HISTORY OF THE GONZALEZ ACT AND THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT

Properly stated, the holding in *Smith* is consistent with the FELRTCA's stated purpose "to protect federal employees from personal liability for common law torts committed within the scope of their employment". *See* Petition at 13, 21a. Indeed, the court of appeals held that the Gonzalez Act plainly immunizes Dr. Marshall from personal liability for any judgment rendered against him in the Smiths' action. As such, the holding in *Smith* does not expose Dr. Marshall or other federal employees to personal liability[13] and is consistent with the stated purpose of the Gonzalez Act and the FELRTCA.

Moreover, as stated in its preface, the FELRTCA was enacted to protect federal employees from a perceived erosion in *common law* tort immunity caused by this

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[13] Thus, the United States' assertion that *Smith v. Marshall* "renew[s] the threat of individual liability," "impede[s] the ability of the government to perform its responsibilities" and "expose[s] a half million urban federal employees in the Ninth Circuit to liability" is plainly wrong. Petition at 9.

Court's decision in *Westfall v. Erwin*,[14] 484 U.S. 292 (1988), not to amend or repeal immunity statutes already enacted by Congress.[15] Indeed, this Court in *Westfall* appeared

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[14] Because the defendants in *Westfall* were executive branch employees not covered by then-existing federal immunity statutes, the sole issue in *Westfall* was the immunity *vel non* to be accorded those employees under common law principles of immunity. In resolving this issue, this Court explained that official immunity should obtain only when the central purpose of official immunity, promoting effective government, outweighs the human cost associated with depriving a tort victim of a judicial remedy:

> This Court has always recognized . . . that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct. We therefore have held that absolute immunity for federal officials is justified only when the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.

484 U.S. at 294. This Court consequently held that federal employees are not entitled to common law immunity unless the challenged conduct is within the outer perimeter of the employees' duties *and* is discretionary in nature.

[15] In addition, the established principle that liability under the Federal Tort Claims Act is determined according to the substantive law of the place in which the alleged negligence occurred may mandate a finding that the substantive law of Italy, not the [American] common-law of tort, will govern this action. *See e.g. Rayonier, Incorporated v. United States*, 352 U.S.

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to endorse the Gonzalez Act and other existing function-specific immunity statutes by articulating that whether immunity is warranted in a particular context should depend on the degree to which the official function would suffer under the threat of potential litigation and consequently that a determination as to the propriety of shielding an official from suit should be based on a "functional" inquiry, *i.e.*, immunity attaches to particular official functions, not to particular offices. In this Court's view, the adoption of a functional approach properly addressed the concern that federal officials enjoy immunity only insofar as the benefits of immunity outweigh the costs. *See Westfall v. Erwin*, 484 U.S. at 296, n. 3.

Significantly, neither the *Westfall* decision nor the legislative history of the subsequently-enacted FELRTCA supports the United States' assertion that the FELRTCA was designed to cover the entire federal work force with one unified scheme of immunity, thereby superceding and impliedly repealing all pre-existing immunity statutes (including those which, like the Gonzalez Act, expressly recognize that military physicians should be qualifiedly rather than absolutely immune from tort liability in specific circumstances). *See also* 38 U.S.C. § 4116; 42 U.S.C. § 233; 10 U.S.C. § 1054 (other federal immunity

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315 (1957). Neither the FELRTCA nor its legislative history suggests that the FELRTCA was intended to apply in this circumstance. The Gonzalez Act, on the other hand, was designed to apply in precisely this circumstance. *See* S. Rep. No. 94-1264, 1976 U.S. Code Cong. and Admin. News 4443, 4451.

statutes which expressly provide that Veterans Administration medical personnel, Public Health Service medical personnel, and Department of Defense legal personnel should be qualifiedly rather than absolutely immune for tort claims arising in foreign countries.) To the contrary, by suggesting that "Congress is in the best position to legislate [applicable immunity standards]", this Court invited Congress to address the desirability of additional function-specific immunity statutes tailored, like the Gonzalez Act, to minimize the human cost of immunity and to assure that deserving claimants not be deprived of remedies without a significant and corresponding benefit to the efficiency of government.[16]

IV. THE HOLDING OF THE COURT OF APPEALS IN *SMITH v. MARSHALL* DOES NOT CONTRAVENE THE EXPRESS LANGUAGE OF THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT

The United States asserts that the holding in *Smith* contravenes the exclusive remedy provision of Section 5

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[16] Significantly, it has been recognized that the chief policy underlying the creation of immunity for lower governmental officials, the desire to encourage "the fearless, vigorous and effective administration of policies of government," does *not* apply to the exercise of medical discretion. This is because the threat of liability for medical negligence does not deter the fearless exercise of medical discretion within government service any more than it deters the fearless exercise of medical discretion outside government service. *See Henderson v. Bluemink*, 511 F.2d 399, 403 (D.C. Cir. 1974).

of the FELRTCA[17]. Even assuming *arguendo* that the FELRTCA applies to medical negligence claims arising in a foreign country, Section 5 does not mandate a finding that federal employees are universally immunized for all torts committed within the scope of employment regardless of whether an alternative federal tort remedy obtains against the United States or against the individual under other federal statutes. Thus, while Congress could expressly have stated that "any other civil action against the employee is precluded without regard to the existence of a remedy against the United States or the existence of a remedy against the individual under any other federal statute," it did not do so in Section 5 or elsewhere in the FELRTCA.

Moreover, other portions of Section 5 of the FELRTCA, codified at 28 U.S.C. § 2679(b)(2), preclude a finding that Congress intended to immunize all federal employees from suits specifically authorized under the

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[17] Section 5 provides:

> [t]he remedy against the United States provided by 1346(b) and 2672 of this title . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

See 28 U.S.C. § 2679(b)(1).

Gonzalez Act. These expressly provide that the "exclusive remedy" provision on which the United States relies "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of a statute of the United States under which such action against the individual is otherwise authorized". *See* 28 U.S.C. § 2679(b)(2) and discussion at Section II, *supra*.

In a futile attempt to counter the clear import of this provision, the United States asserts that the FELRTCA supercedes the Gonzalez Act by providing, in subparagraph (4) of Section 6, codified at 28 U.S.C. § 2679(d)(4), that an action or proceeding subject to paragraphs 1, 2 and 3 of the FELRTCA (including the exclusive remedy provision) "shall proceed in the same manner as any action *against the United States* filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. § 2679(d)(4). Clearly, this provision articulates circumstances under which suit against *the United States* must be dismissed, is insufficient to preclude suit against the responsible individual expressly authorized under other immunity statutes, and therefore does not warrant an inference that Congress intended to preclude a Gonzalez Act suit against an individual physician for medical negligence committed within the scope of his military medical duties in a foreign country.

In a further attempt to support the assertion that the FELRTCA "expressly" immunizes Dr. Marshall from suits expressly authorized under the Gonzalez Act, the United States turns to Section 6 of the FELRTCA, codified at 28 U.S.C. § 2679(d), which provides for substitution of the

United States as defendant (upon certification by the Attorney General that the employee was acting within the scope of his office or employment) and provides for remand upon the district court's determination that the employee was not acting within the scope of his employment.

The United States seeks to infer from these provisions of Section 6 that an action may not be remanded (and therefore may not be *maintained*) against the employee unless the challenged conduct was outside the scope of his employment. Clearly, Congress envisioned that suits against individual federal employees which arise under the Constitution and federal statutes (as provided in Section 5 of the FELRTCA, codified at 28 U.S.C. § 2679(b)(2)), would necessarily be pursued in federal court and therefore would not be remanded to state court.[18] Beyond this, the very fact that Congress envisioned and approved the pursuit of constitutional or federal statutory actions against individual federal employees is, without more, sufficient evidence that *Smith v. Marshall* was properly decided.

Finally, the manner in which Congress chose to integrate the FELRTCA within Chapter 171 of the Federal Tort Claims Act precludes a finding that Congress intended to foreclose suit against an individual based on

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[18] The FELRTCA contains no provision expressly or impliedly excepting it from the operation of 28 U.S.C. § 1447, the federal statute which applies to all remands for lack of jurisdiction.

the foreign country exception to the Federal Tort Claims Act.[19] *See* 28 U.S.C. § 2680(k). Incontrovertibly, the FELRTCA is part of Chapter 171 of the Federal Tort Claims Act, a chapter which also includes the Section 2680 exceptions to the liability of the United States under the Federal Tort Claims Act. Significantly, Section 2680 expressly states that the provisions of Chapter 171 (including the FELRTCA) shall not apply to claims arising in a foreign country. *See* 28 U.S.C. § 2680(k). This express limitation on the scope of the FELRTCA also supports the court of appeals' holding that the FELRTCA does not supercede the Gonzalez Act or otherwise apply to this case. *See Newman v. Soballe*, 879 F.2d at 971.

V. THERE IS NO CONTROVERSY AMONG THE COURTS OF APPEALS CONCERNING THE HOLDING IN *SMITH v. MARSHALL*

Erroneously, the United States asserts in its Petition that the Fifth and Tenth Circuits have concluded that the FELRTCA applies to *all* tort suits against federal employees who have acted within the scope of their employment, whether or not a claim falls within an exception to

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[19] That Congress chose to place the FELRTCA amendment to the Federal Tort Claims Act within the confines of Chapter 171 cannot be ascertained from the amendment as it appears in the Appendix to the Petition. Only by reading the amendment in the United States Code or other integrated publications is it apparent that the scope of the FELRTCA is expressly limited by the subsection 2680 exceptions to the tort liability of the United States, including Section 2680(k), which excepts the United States from liability for claims arising in a foreign country.

the Federal Tort Claims Act. Petition at 11-12, *citing Mitchell v. Carlson*, 896 F.2d 128, 134-35 (5th Cir. 1990); *Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) (emphasis original). In actuality, neither *Mitchell* nor *Aviles* involved the issue as to whether the FELRTCA supercedes or replaces a pre-existing federal immunity statute expressly designed to cover the specific employee and conduct there at issue.

Indeed, of all discovered cases concerning the FELRTCA, only one case (in addition to *Smith*) has addressed whether the FELRTCA supercedes another federal immunity statute. *See Newman v. Soballe*, 871 F.2d at 969. In *Newman*, as in *Smith*, the issue was whether the FELRTCA superceded the Gonzalez Act with respect to claims against military physicians arising out of medical negligence committed in a foreign country. Resolving this issue in the negative, the United States Court of Appeals for the Eleventh Circuit properly held that "[a]s a military physician, [the defendant] is specifically protected by the Gonzalez Act and is therefore not among those federal employees affected by the *Westfall* decision or the [FELRTCA]." *Id.* at 971. The Court further noted that the FELRTCA is part of Chapter 171 of the Federal Tort Claims Act, the provisions of which, by the express terms of Section 2680, do *not* apply to any claim arising in a foreign country. *Id. See also* 28 U.S.C. § 2680(k).

As such, the only courts of appeals to have addressed whether the FELRTCA supercedes the Gonzalez Act's provision for a suit against an individual military physician based on medical negligence claims arising overseas have unequivocally held that it does not. Consequently,

there is no split in the circuits concerning the holding here at issue.

VI. THE HOLDING OF THE COURT OF APPEALS IN *SMITH v. MARSHALL* IS A CORRECT STATEMENT OF FEDERAL STATUTORY LAW AND ANY AMENDMENTS THERETO SHOULD BE LEFT TO CONGRESS

Incontrovertibly, the United States' arguments are designed to one overwhelming end; to prevent Marcus and Hildegard Smith from recovering for the heartbreaking, emotionally and financially devastating injuries which their son Dominique, now seven years old and without cognitive life, suffered as an infant in Dr. Marshall's care. Clearly, Congress did not intend by enacting the statutes at issue to deprive deserving claimants of a remedy and would not have sanctioned the manner in which the United States, for the last four years, has used first one statute and then the other to prevent an innocent, devastated family from obtaining the compensation that would at least address the cost of caring for their brain-devastated child. Nor did Congress intend to prevent recompense simply because the child's father had the misfortune to be stationed abroad in the service of his country when his child was born.

Clearly, both the Gonzalez Act and the FELRTCA evince Congress' intention to protect federal employees from personal tort liability while simultaneously "providing persons injured by the common law torts of federal employees with an appropriate remedy against the United States." App. at 20a. Equally clearly, the holding of the court of appeals in *Smith v. Marshall* unequivocally

accords with the purpose of each statute by permitting the Smiths to pursue a cause of action expressly recognized in subsection (f) of the Gonzalez Act and by confirming the United States' obligation, also set forth in subsection (f), to immunize Dr. Marshall from personal tort liability by indemnifying him from the judgment entered in the Smiths' action.[20]

Under these circumstances, it is impossible to discern error in the decision of the court of appeals. Indeed, if there is error, as the United States asserts, it must be in Congress' failure to have expressly repealed all pre-existing immunity statutes when it enacted the FELRTCA, not in the court of appeals' failure to have adjudicated the repeal of the Gonzalez Act and the many other specific, well-tailored immunity statutes carefully crafted by Congress during the past several decades. If Congress intended to repeal these statutes, there is today no evidence of that intent, and it should be left to Congress to address this issue in the future.

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[20] Curiously, the United States' position in this matter exposes military physicians now protected by Gonzalez Act indemnification to the threat of personal liability for medical malpractice judgments entered in foreign courts. Thus, the United States conceded below that the Federal Tort Claims Act has no jurisdictional reach in foreign tort actions and that the only form of immunity available to military physicians sued in foreign courts is the indemnification provided by subsection (f) of the Gonzalez Act. The United States' position that the FELRTCA supercedes the Gonzalez Act would, if accepted, deprive all military physicians now practicing overseas of the benefit of their only source of immunity from personal liability for foreign judgments, an untenable result which Congress did not legislate or intend.

CONCLUSION

For the aforestated reasons, Respondents Marcus, Hildegard and Dominique Smith respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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